

being served. Criteria which can be used to determine if a railroad is proposing to provide a more competitive service to a currently served area include: (1) Creating a shorter route; (2) providing enhanced service capabilities (speed is not the only factor); (3) entering an interchange or market generating more than 5,000 cars per year or 5 percent of applicant's traffic; (4) filing the application as a condition of relief to a pending proceeding; and (5) permitting a carrier to become more competitive (extending its length of haul) See. *Burlington Northern, Inc.—Control & Merger—St. L.*, 354 I.C.C. 616, 617 (1978).

(d) *Petition for clarification.* A request that the Board clarify the applicability of any part of these regulations to a particular situation or explain the type of material needed to comply with these regulations.

(e) *Petition for waiver.* A request that the Board either dispense with material required by the regulations, or accept material in place of that required by these regulations.

(f) *Primary application.* A proposal for approval filed under 49 U.S.C. 11323 which begins a new proceeding and is not proposed either as a condition to or as an alternative to Board approval of another pending application.

(g) *Railroad.* Any common carrier by railroad as defined in 49 U.S.C. 10102(5)–(6).

(h) *Responsive applications.* Applications filed in response to a primary application are those seeking affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). For fees covering inconsistent applications or responsive applications not otherwise covered in the Board's fee schedule, see 49 CFR 1002.2(f) (38)–(41) and 1180.4(d)(4)(ii). The fees for all other responsive applications are set forth in 49 CFR 1002.2(f).

(i) *Transferee.* The transferee is:

(1) The acquiring corporation in a control proceeding,

(2) The surviving corporation in a merger,

(3) The resulting corporation in a consolidation,

(4) The lessee in a lease,

(5) The purchaser in an acquisition, and

(6) The grantee of trackage rights in a trackage rights proceeding.

(j) *Transferor.* The transferor is:

(1) The corporation acquired in a control proceeding,

(2) The merging corporation in a merger,

(3) All corporations to be consolidated in a consolidation,

(4) The lessor in a lease,

(5) The seller in an acquisition, and

(6) The grantor of trackage rights in a trackage rights proceeding.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, as amended at 62 FR 9716, Mar. 4, 1997; 62 FR 28376, May 23, 1997]

#### § 1180.4 Procedures.

(a) *General.* (1) The original and 20 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

(2) Each party to a proceeding shall choose a unique acronym of four letters or less for itself. It shall number each document filed in the proceeding consecutively, prefixed by its acronym.

(3) Any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. At any time, the Board may require the submission of additional copies of any document previously filed by any party to the proceeding.

(4) The Board shall issue a list of all parties to the proceeding within 55 days of the application's acceptance in a *major* transaction, and within 45 days in a *significant* or *minor* transaction.

(b) *Prefiling notification.* (1) Between 3 to 6 months prior to the proposed filing of an application in a *major* transaction, and 2 to 4 months prior to the proposed filing of an application in a *significant* transaction, applicant shall

file a notice with the Board. The notice shall:

- (i) Briefly describe the transaction,
- (ii) Indicate the year to be used for the impact analyses,
- (iii) Indicate the approximate filing date of the application, and
- (iv) Indicate why the transaction is *major* or *significant*.

(2) The Board will publish a notice in the FEDERAL REGISTER within 30 days of receipt of the applicant's notice. The publication shall contain:

- (i) A brief description of the transaction,
- (ii) The year to be used for the impact analysis,
- (iii) The approximate filing date,
- (iv) A determination that the transaction is *major*, *significant*, or *minor*, and
- (v) A statement of any additional information which must be filed with the application in order for the application to be considered complete.

(3) A prefiling notice may be amended to indicate a change in the anticipated filing date.

(c) *Application.* (1) The fees for filing applications, petitions, or notices under these procedures are set forth in 49 CFR 1002.2.

(2) Filing requirements.

(i) The original of all applications shall be signed in ink by the applicant, if an individual; by all partners, if a partnership; and if a corporation, association, or other similar form of organization, by its president, or such other executive officer having knowledge of the matters therein contained and duly designated for that purpose by the applicant. Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any person controlling an applicant shall also sign the application.

(ii) The application shall be filed with Secretary, Surface Transportation Board, Washington, DC 20423.

(iii) Each copy of the application shall conform in all respects to the original and shall be complete in itself except that the signature in the copies may be stamped or typed and the notarial seal may be omitted. In like

manner, where certified copies of documents are filed with the application, conformed copies thereof, showing certification in stamped or typewritten form, will be sufficient to accompany the additional copies of the application.

(iv) All applications required to be filed with the Board or served on designated persons shall include all exhibits, except as otherwise specifically noted. Information from other documents may be incorporated by reference in the application. However, the documents must have been filed with the Board within three years prior to filing of the application, the information must be up to date, and applicant must be prepared to supply copies of this information to interested persons on specific request.

(v) The applicant shall submit such additional information to support its application as the Board may require.

(vi) Applicant shall file concurrently all directly related applications, *e.g.*, those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc.

(vii) The application shall contain a certificate of service indicating that all persons designated in §1180.4(c)(5) have been served with a copy of the application.

(3) In a *major* or *significant* transaction, and in all responsive applications, all of the direct testimony of applicants, in the form of verified statements, shall be filed and served with each application.

(4) The application and all exhibits shall be considered part of the evidentiary record upon acceptance. Any portion of an application and exhibits will remain subject to motions to strike. However, no motion need be made to have the application and exhibits admitted to the evidentiary record. If a *major* or *significant* transaction is designated for oral hearing the presiding Administrative Law Judge shall have discretion in extraordinary circumstances to allow for the presentation of oral or written direct testimony not previously submitted with the application.

(5) Service. The applicant shall serve a conformed copy of an application

filed under these procedures by first-class mail upon:

(i) The Governor (or Executive Officer), Public Service Commission, and the Department of Transportation of each State in which any part of the properties of the applicant carriers involved in the proposed transaction is situated;

(ii) The Secretary of the United States Department of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW., Washington, DC 20590).

(iii) The Attorney General of the United States;

(iv) The Federal Trade Commission; and

(v) In *major* or *significant* transactions, all persons requesting a copy after the prefiling notice is published in the FEDERAL REGISTER.

(6) Application format. (i) The application shall be in the same sequence as the information is requested in these procedures, and shall be numbered to correspond to the numbering in the procedures.

(ii) If any material required in the application would lend itself to being placed in an appendix, this should be done. The appendix and application shall be tabulated and cross-referenced in an index for ease in locating and referring to the information. The appendices shall be in the same sequence as the information required by these procedures. If certain information required in the application is not applicable, provide an explanation. The application should be bound, and it may be bound in more than one volume. If an application is more than one volume, the cover of each volume should be in a different color. The pages in each volume shall begin with 1, and be sequentially numbered.

(iii) The Board's Office of the Secretary will provide informal opinions and interpretations, which are not binding on the Board, regarding the format of or information to be included in the application.

(iv) All filing, service, or other requirements of these procedures must be complied with when filing the application. Copies of the application filed with the Board shall be marked in red

“Railroad Consolidation Application” on the transmittal envelope or package.

(v) The application shall conform to the typographical specifications of § 1104.2.

(7) Acceptance or rejection of an application.

(i) The Board shall accept a complete application no later than 30 days after the application is filed with the Board by publishing a notice in the FEDERAL REGISTER. A complete application contains all information for all applicant carriers required by these procedures, except as modified by advance waiver. The publication shall indicate the applicable time limits for processing the application. (These are the time limits of 49 U.S.C. 11325(b) for a *major* transaction, 49 U.S.C. 11325(c) for a *significant* transaction, and 49 U.S.C. 11325(d) for a *minor* transaction.)

(ii) The Board shall reject an incomplete application by serving a decision no later than 30 days after the application is filed with the Board. The decision shall explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference. The resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computation of the time periods, provided that the resubmitted application is accepted as complete.

(8) The application must present a *prima facie* case. Applicants can fail to meet their burden of proof and thus not present a *prima facie* case either by (i) disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest, or by (ii) disclosing facts that affirmatively demonstrate that the proposal is not in the public interest. See Ex Parte No. 282 (Sub-No. 3A), *Railroad Consolidation Procedures Expedited Processing*, 363 I.C.C. 767 (1980).

(d) *Response to application.* (1) Written comments.

(i) *Time to file.* (A) Written comments on a *major* transaction must be filed no later than 45 days after an application is accepted.

(B) Written comments on *significant* or *minor* transactions must be filed

within 30 days of the application's acceptance.

(ii) *Service*. Written comments shall be concurrently served by first-class mail on:

(A) The applicants (at each address given in the application),

(B) The United States Secretary of Transportation,

(C) The Attorney General of the United States, and

(D) All parties of record within 10 days of service of the service list by the Board.

(iii) *Contents*. Written comments must contain:

(A) The docket number and title of the proceeding.

(B) The name, address, and telephone number of the commenting party and its representative upon whom service shall be made.

(C) The commenting party's position (in support, opposition, or undetermined).

(D) If the commenting party intends to participate formally in a proceeding or merely comment upon the proposal.

(E) If desired, a request for an oral hearing with reasons supporting this request. The request must indicate the disputed material facts that can only be resolved at a hearing.

(F) A list of all information sought to be discovered from applicant carriers.

(G) A detailed statement of the issues in *major* and *significant* transactions reflecting the relevant underlying statutory criteria, policy statement (for *major* transactions), and antitrust policy which the Board must consider in the proceeding.

(H) An initial list of specific protective conditions sought *by nonrailroads* in *major* and *significant* transactions.

(I) The following information *by railroads* filing written comments in *major*, and *significant* transactions:

(1) Any existing preferential solicitation agreements.

(2) A list of all run-through train operations.

(3) An initial list of specific protective conditions sought and a statement concerning whether the commenting railroad intends to file responsive applications, along with a description of the proposed transactions. This will be considered a prefiling notice without

which the Board will not entertain responsive applications.

(iv) *Party*. All persons who file timely written comments shall be a party of record if they so indicate in their comments. In this event, no petition for leave to intervene need be filed.

(2) The Secretary of Transportation and Attorney General of the United States shall file written comments with the Board within 60 days of the date of acceptance of the application in a *major* transaction. For *significant* and *minor* transactions these comments are due within 45 days of the date of acceptance of the application. These comments shall comply with paragraphs (d)(1)(ii) and (d)(1)(iii) of this section as to service and contents.

(3) A second list of protective conditions shall be filed with the Board within 75 days of acceptance of the application in a *major* transaction, and within 60 days of acceptance of the application in a *significant* transaction. It shall be concurrently served by first-class mail on all parties of record. The second list of protective conditions shall modify the first list based upon changing conditions, such as protective conditions sought by other parties to the proceeding. Parties to the proceeding shall not be permitted to seek any protective conditions not contained in the second list of protective conditions. This does not preclude refinements in conditions sought, particularly when stipulations to conditions are reached.

(4) Responsive applications.

(i) All responsive applications in *major* transactions shall be filed 90 days, and in *significant* transactions 60 days, after acceptance of the primary application. No responsive applications shall be permitted to *minor* transactions.

(ii) For filing fee purposes, a responsive application that is an inconsistent application will be classified as a *major*, *significant*, or *minor* transaction as provided for in § 1180.2(a)-(c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38)-(41). The fee for any other types of responsive applications is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(iii) Responsive applications shall comply as fully as possible with appropriate Board regulations. Extensions of time for filing are not permitted. The filing of an incomplete application, coupled with an extension of time to complete the application, may be permitted if authorized by the Board in advance.

(iv) Any petitions for waiver, clarification, extension of time, or for leave to file an incomplete application, or to rebut the presumption of a *significant* transaction, must be filed in advance of the filing of the responsive application (at least 45 days in advance in *major* transactions and 30 days in *significant* transactions).

(v) Each responsive application filed and accepted (if required) is considered consolidated with the primary application.

(e) *Evidentiary proceeding.* (1) The Board may order an oral public hearing, a hearing by written submissions, or another kind of evidentiary proceeding. The determination will generally be made on the basis of the needs indicated by the written comments.

(2) The evidentiary proceeding will be completed:

(i) In 24 months (after the primary application is accepted) for a *major* transaction,

(ii) In 180 days for a *significant* transaction, and

(iii) In 105 days for a *minor* transaction;

(3) A final decision on the primary application and on all consolidated cases will be issued;

(i) In 180 days (after the conclusion of the evidentiary proceeding) for a *major* transaction,

(ii) In 90 days for a *significant* transaction, and

(iii) In 45 days for a *minor* transaction.

(4) The Secretary of Transportation may propose modifications to any transaction and shall have standing to appear before the Board in support of any such proposed modification.

(f) *Waiver or clarification.* (1) Upon petition of a prospective applicant, the Board may waive or clarify a portion of these procedures. A petition to waive all of the procedures will not be entertained.

(2) Except as otherwise provided in paragraph (d)(4)(iv) of this section, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

(3) No replies to a petition for waiver will be permitted, except where a proceeding involving the same parties and a related transaction is pending before us.<sup>1</sup> When a reply is permitted, the petition shall be served by first-class mail on all parties to the pending proceedings, with a reply due within 10 days of service. Replies to a petition for clarification shall be permitted within 10 days of the petition's filing.

(4) A waiver or clarification granted to any applicant in a proceeding shall apply to any other party to the proceeding unless otherwise indicated.

(5) All petitions for waiver or clarification must specify the sections for which waiver or clarification is sought and give the specific reasons why each waiver or clarification is necessary.

(g) *Notice of exemption.* (1) To qualify for an exemption under § 1180.2(d), a railroad must file a verified notice of the transaction with the Board at least one week before the transaction is consummated indicating the proposed consummation date. Before a notice is filed, the railroad shall obtain a docket number from the Board's Office of the Secretary.

(i) The notice shall contain the information required in § 1180.6(a)(1)(i)–(iii), (a)(5)–(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) The Board shall publish a notice in the FEDERAL REGISTER within 30 days of the filing of the notice of exemption. The publication will indicate the labor protection required. If the notice of exemption contains false or misleading information which is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(iii) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

<sup>1</sup>See *Itel Corp.—Control-Green Bay and W. R. Co.*, 354 I.C.C. 232, 233 (1978).

## Surface Transportation Board, DOT

## § 1180.6

(2)(i) To qualify for an exemption under § 1180.2(d)(7) (acquisition or renewal of trackage rights agreements), in addition to the notice, the railroad must file a caption summary suitable for publication in the FEDERAL REGISTER. The caption summary must be in the following form:

### SURFACE TRANSPORTATION BOARD

#### *Notice of Exemption*

#### Finance Docket No.

(1)—Trackage Rights—(2)

(2) (3) to grant (4) trackage rights to (1) between (5). The trackage rights will be effective on (6).

This notice is filed under § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

James H. Bayne,

*Secretary.*

The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.

(2) Name of the landlord railroad.

(3) If an agreement has been entered use "has agreed", but if an agreement has been reached but not entered use "will agree."

(4) Indicate whether "overhead" or "local" trackage rights are involved.

(5) Describe the trackage rights.

(6) State the date the trackage rights agreement is proposed to be consummated.

(ii) The Board will publish the caption summary in the FEDERAL REGISTER within 20 days of the date that it is filed with the Board. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption.

(3) Some transactions may be subject to environmental review pursuant to the Board's environmental rules at 49 CFR part 1105.

(h) *Official notice.* In connection with any application or request for relief under these procedures, the Board may take official notice of any or all of the following information. These data will be presumed valid unless discredited by any party. A party relying on information to be noticed officially shall list the information. Upon request, the party shall make the official notice material available. Any party is free to challenge the relevance or application

of any such data, or the weight that should be accorded it.

(1) Annual STB Form R-1 Reports submitted by rail carriers.

(2) Quarterly Commodity Statistics submitted by rail carriers.

(3) STB Monthly Labor Statistics.

(4) Quarterly Financial Statements of Rail Carriers.

(5) All other reports submitted to the STB under oath.

(6) Annual 1-percent Waybill Sample.

(7) Federal Reserve Board Production Statistics.

(8) AAR compilations of bad order ratios, equipment ownership and repair statistics, and freight car order figures.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982 and amended at 49 FR 15088, Apr. 17, 1984; 50 FR 15751, Apr. 22, 1985; 51 FR 4928, Feb. 10, 1986; 51 FR 25207, July 11, 1986; 52 FR 46484, Dec. 8, 1987; 56 FR 36111, July 31, 1991; 56 FR 41806, Aug. 23, 1991; 58 FR 29362, May 20, 1993; 58 FR 63104, Nov. 30, 1993; 62 FR 9717, Mar. 4, 1997]

## § 1180.5 [Reserved]

## § 1180.6 Supporting information.

(a) All applications filed under 49 U.S.C. 11323 shall show in the title the names of the applicants and the nature of the proposed transaction. Beneath the title indicate the name, title, business address, and telephone number of the person(s) to whom correspondence with respect to the application should be addressed. The following information shall be included in all applications:

(1) A description of the proposed transaction, including appropriate references to any supporting exhibits and statements contained in the application and discussing the following:

(i) A brief summary of the proposed transaction, the name of applicants, their business address, telephone number, and the name of the counsel to whom questions regarding the transaction can be addressed.

(ii) The proposed time schedule for consummation of the proposed transaction.

(iii) The purpose sought to be accomplished by the proposed transaction, e.g., operating economies, eliminating excess facilities, improving service, or improving the financial viability of the applicants.